Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	CS Docket No. 95-61

To: The Commission

COMMENTS OF HOME BOX OFFICE

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SUMMARY

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") to promote competition among multichannel video programming distributors (MVPDs). Congress sought to foster such competition by encouraging the development of MVPDs that could compete with cable operators. In its 1994 Competition Report, the Commission concluded that alternative distribution media had made substantial strides since the Commission examined the status of cable competition in 1990. HBO submits that in its second report to Congress, the Commission should make clear that competition among MVPDs is healthy and robust, and that there is every indication that it will continue to be so.

Cable faces increasing competition primarily because of the rapid proliferation of alternative MVPDs. According to industry projections, the direct broadcast satellite ("DBS") services which debuted last year, DIRECTV/USSB, already have accumulated nearly 600,000 subscribers, and expect to garner 1.6 million by year end. The wireless cable industry, which in the past has had difficulty attracting investors, is enjoying a renaissance of sorts, receiving capital from established communications providers such as the Regional Bell Operating Companies and establishing prominence as a low cost means of distributing video programming. C-band home satellite dishes, the advent of video dialtone, satellite master antenna television systems, over-the-air

broadcasting, VCRs and other alternative MVPDs also factor into the competitive equation. Moreover, digital compression, with its tremendous capability of increasing channel capacity, will likely be deployed by MVPDs across the board, leveling the playing field and further facilitating direct competition with cable systems.

HBO and other programming vendors have benefitted from the increased numbers of distribution technologies. Programmers have every incentive to distribute their services through as many technologies and as many viable distributors as possible, as a strategy involving widespread distribution consistently results in increased numbers of subscribers. HBO has found that increased competition among video programming services has increased the penetration of HBO services in the marketplace. Currently, nearly twenty percent of HBO and Cinemax subscribers are served by non-cable technologies, testament to the fact that alternative MVPDs have full access to top-quality programming, and militating against the need for program access rules.

Finally, HBO cautions the Commission that in evaluating whether set-top boxes should be made available at the retail level, it must evaluate the significant downside. Theft of services has long plagued the non-broadcast television industry, and set-top boxes are the primary means to guard against such theft. For years, MVPDs, programmers, and the electronics industry have worked to create a secure distribution highway. By making these descramblers freely available, the Commission risks unraveling those efforts, and fueling theft of services, which currently represents a multi-billion dollar problem to the cable

industry alone. Because theft of services raises the cost of doing business for programmers, MVPDs and, ultimately, consumers, product security is essential to the economic well being of operators, subscribers and program networks. In addition, product security is vital for continued investment in programming and distribution services and, therefore, continued increased competition.

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Home Box Office, a Division of Time Warner Entertainment Company, L.P. ("HBO"), by its attorneys, hereby submits these comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.[1] Approximately a year ago, the Commission concluded that "alternative distribution media have made substantial strides" since the Commission had previously examined the matter in 1990.[2] As will be demonstrated more fully below, the competitive environment in video programming delivery has improved even more in the last year. Competition among multichannel video program distributors ("MVPDs") is healthy and

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1 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-6, FCC 95-186 (released May 24, 1995) ("Notice" or "NOI").

2 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 FCC Rcd 7442, 7449 (1994) ("1994 Competition Report").

robust, and all indications are that the market will continue to become increasingly competitive in the near future.

I. INTRODUCTION/SUMMARY

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[3] directs the Commission to report annually to Congress on the status of competition in the market for the delivery of video programming.[4] The Commission issued its first report in compliance with this statutory requirement on September 28, 1994.[5] In these Comments, HBO will provide the Commission with information to assist it in preparing the second of the annual reports.

HBO, as the owner of HBO and Cinemax, is a leading supplier of premium video entertainment.[6] HBO's services are transmitted via satellite, direct-to-home, and to commercial affiliates which, in turn, utilize various methods of local video distribution, including cable television systems, satellite master antenna systems ("SMATV") and multichannel multipoint distribution services ("MMDS" or "wireless cable"). HBO competes for subscribers nationally with other programming services (both pay

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3 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 512 et seq.

4 47 U.S.C. § 548(g).

5 Supra at note 2.

6 In response to the Commission's question posed at ¶ 88(a) of its NOI, HBO is owned by Time Warner Entertainment Company, L.P., which is a controlled by Time Warner Inc. No material ownership changes in HBO have occurred over the past year.

and basic) that are distributed by multichannel distributors. Not only does HBO compete for subscribers, but it also competes with other programmers for "shelf space" on the channels of MVPDs. HBO also competes with over-the-air broadcasters, motion picture theaters and with videocassette distributors.[7]

As of year-end 1994, HBO served 20 million subscribers. Approximately 7 million consumers subscribed to Cinemax. HBO currently averages in HBO homes a 4.0 rating/11 share during all dayparts, with a 7.5 rating/11 share in prime time. Cinemax averages in Cinemax homes a 2.9 rating/8 share overall, with a 4.7 rating/7 share in prime time.

Based on reliable statistical information, it is evident that various types of alternative MVPDs have increased penetration and subscribership over the past year, offering consumers attractive alternatives to cable and thus exerting a significant, favorable effect on market performance. The number of MVPDs to which cable system subscribers have access has increased dramatically. These alternative MVPDs consistently have been able to obtain top cable programming, making them attractive and viable competitors.

Today, nearly twenty percent of HBO and Cinemax subscribers are served by non-cable distribution technologies. This fact is testament to the increasing favorable impact of alternative MVPDs

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7 HBO will not comment extensively herein on the relevant product market for delivered video programming. It does note, however, that the product market is expanding. DIRECTV, for example, has created a new product in its Season Ticket sports packages, and has devoted a large number of channels to pay-per-view, effectively creating a nationwide near-video-on-demand service.

on the competitive nature of the marketplace. Further, because video programmers have every incentive to find as many outlets for their product as possible, the ease with which non-cable MVPDs can access top quality programming increases their competitive viability. As the alternative multichannel distributors migrate to digital compression technology, their channel capacity will increase significantly, thus further leveling the competitive playing field.

II. COMPETITION AMONG MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS IS ROBUST

A. Non-Cable Technologies Continue To Provide Increased Competition to Cable Television

1. Wireless Cable Systems

a. MMDS

Recent figures indicate that MMDS, or wireless cable, is fulfilling its promise to become a viable competitor to cable. The success of MMDS is attributable largely to the fact that it is a low cost competitor, not to product differentiation. Thus, wireless cable operators compete by delivering the best of the cable programming services at a cost below the typical charges of cable operators.

Certain structural advantages make wireless an inexpensive, attractive MVPD alternative. For example, wireless cable providers need only invest in installation for those who buy service, whereas cable systems must invest in infrastructure for whole neighborhoods. Moreover, wireless cable has no cables to be broken, eliminating the need for large maintenance crews or large

telephone staffs to handle customer service calls. The major impediments to MMDS' development have been limited access to capital, which has improved greatly over the past year, and regulatory delays in authorizing MMDS licensees, an impediment the Commission recently has taken steps to resolve.[8]

In its 1994 Competition Report, the Commission estimated that the wireless cable industry was serving 550,000 subscribers through 143 systems and was gaining increased respect in public debt and equity markets.[9] Over the past year, the wireless cable industry has shown significant growth. According to the Wireless Cable Association, there are presently 170 wireless cable systems providing service to roughly 700,000 subscribers in the United States.[10] Two hundred systems serving nearly 1,000,000 subscribers are projected by year-end.[11]

While it was once difficult for wireless cable operators to obtain access to capital, wireless continues to gain respect in the public debt and equity markets. The banking firm of Alex. Brown & Sons recently issued a report calling the wireless cable industry a "potentially lucrative niche with low break-even points

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8 "Commissioners clash over MDS," Broadcasting & Cable, June 12, 1995 at 14.

9 1994 Competition Report at 7482.

10 "MMDS (wireless cable): A capital idea," Broadcasting & Cable, May 1, 1995 at 16-17.

11 Id.

and the lowest-cost capital expenditures per subscriber of any multichannel video provider."[12]

In addition, large established communications companies are acquiring wireless cable operations. In April 1995, Pacific Telesis paid $175 million for the stock of the nation's fourth largest wireless cable operator, Cross Country Wireless, which owns a 42,000 subscriber system in Riverside, California.[13] In March, Bell Atlantic and NYNEX invested $100 million in CAI Wireless, with an option to purchase 45% of the company for a total investment of $300 million.[14] Publicly traded People's Choice TV Corp. recently agreed to a $10.3 million acquisition of all of the capital stock of Indianapolis based wireless operator Broadcast Cable, Inc., and the Chase Manhattan Corp. completed an equity investment in Wireless One, a developer and operator of wireless cable systems in the south central United States.[15] According to Gerard Klauer Mattison & Co. ("GKM"), a financial services company that specializes in the industry, there are now seven major publicly traded wireless cable companies with a

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12 Id.

13 Cross Country built its subscription base since commencing operations in 1991. During the same time period, cable systems operated by Tele-Communications, Inc., Comcast and Crown have watched their collective subscriber totals in the franchise areas served by Cross Country decline from 201,000 to 189,000. "The Wireless System that Could," Broadcasting & Cable, May 1, 1995 at 20.

14 "MMDS (wireless cable): A capital idea," Broadcasting & Cable, May 1, 1995 at 16-17.

15 Id.

collective growth rate of about 175,000 new customers a year.[16] GKM's wireless stock index climbed by 60.8% during first quarter 1995.[17]

New capital is expected to help the wireless cable industry invest in digital equipment that will allow operators to greatly expand their offerings through digital compression technology. Channel capacity, which now stands at 33 on most systems, would expand to up to 250. PacTel expects its wireless cable operations to offer 100 channels of digital programming by 1996.[18] The company is projecting revenue of $250-$300 million by 2000 and is targeting break-even cash flow within four years.[19]

b. LMDS

Cellularvision, a pioneer of this technology, provides 49 channels of programming to 1000 households in Brighton Beach, Brooklyn, New York. Cellularvision indicates that it is adding 25 to 30 new customers per day in the New York area.[20]

2. Direct-to-Home Satellite Service

The direct-to-home ("DTH") satellite delivery of video programming also is proving a viable competitor to cable. High-power direct broadcast satellite services ("DBS"), medium-power Ku-Band fixed satellite services, and C-band home satellite dish

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16 Id.

17 Id.

18 Id.

19 Id.

20 New York Times, April 18, 1995 at D1.

("HSD") services each have shown explosive growth in the past year. Industry experts indicate that DTH operators will draw away approximately one million existing or former cable subscribers this year and have the potential to claim up to 20% of the subscriber base of cable systems considered vulnerable to competition.[21] The DTH business in the United States is expected to amass $3.5 billion from hardware and programming sales during 1995, according to the Satellite Broadcasting and Communications Association ("SBCA").[22] Industry analysts project that direct-to-home satellite services will reach 10 million homes by the year 2000.[23] To promote DTH satellite services, industry players will spend over $300 million in advertising in 1995.

a. Medium-Power Ku-Band

PRIMESTAR Partners L.P. currently offers medium-power direct-to-home video satellite programming in the Ku-band fixed satellite service. At the time of the Commission's 1994 Competition Report, PRIMESTAR had just made the transition from analog to digital transmissions and served 70,383 subscribers, offering 71 video channels.

Currently, PRIMESTAR offers 73 channels of audio and video programming to more than 400,000 subscribers. PRIMESTAR is

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21 "Cable Faces Renewed Satellite Competition," Broadcasting & Cable, June 12, 1995 at 29.

22 "DBS Comes of Age," Electronic Media, April 24, 1995 at 2.

23 Money, June 1995 at 29.

projecting its DTH services will be in one million homes by year-end 1995.[24]

PRIMESTAR offers consumers an equipment/service/programming package which includes the use of all equipment (mini-satellite dish, decoder box and remote control), digitally delivered entertainment programming and ongoing service and maintenance starting at about $1 per day.[25] PRIMESTAR differentiates itself from DBS suppliers through this lease program, which requires neither the purchase of equipment nor obligates consumers to deal with a variety of vendors.

In late 1994, PRIMESTAR entered into arrangements with Advanced Communications Corporation and TEMPO DBS, Inc. whereby PRIMESTAR would begin transmitting in 1996 from new high-powered DBS satellites using the Advanced DBS channels at 110° W.L. The migration to DBS would permit PRIMESTAR to expand its capacity to up to 200 channels.[26] PRIMESTAR's expansion to DBS is contingent on reversal of the International Bureau's decision in Advanced Communications Corporation ("Advanced"), DA 95-944, released April 27, 1995. That decision rescinded Advanced's DBS authorization, effectively precluding PRIMESTAR from providing a competitive DBS service. Applications for Review of that decision are pending.

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24 "DBS Comes of Age," Electronic Media, April 24, 1995 at 2.

25 Id.

26 "Primestar's miles-high problem," Broadcasting & Cable, May 8, 1995 at 92.

Should the Commission allow the Advanced order to stand, it would thwart the very type of competition it seeks to promote through its various policies and through this proceeding. PRIMESTAR is a well-financed, experienced DTH provider that would initiate service using Advanced's orbital slots and channels by some time next year. Should PRIMESTAR be precluded from migrating to high-power DBS, it would be unable to compete fully with existing DBS providers. Moreover, the lead time necessary before other DBS services could be successfully launched would allow existing providers to become entrenched, thereby significantly diminishing competition in the DBS arena in the foreseeable future.

A Canadian company has announced plans to deliver DTH service via a medium power Ku-band satellite later this year. Ontario-based Tee-Comm will lease space on the AT&T Telstar 402R satellite to launch a 100 channel DTH service.[27] Tee-Comm's planned Alpha-Star service will expand to more than 200 channels with the launch of AT&T's Telstar 5 satellite.[28] Tee-Comm intends to provide 24-inch receiving dishes and set-top units for the service, and plans to distribute hardware through sellers of C-band home satellite dish equipment.[29]

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27 "Canadian player eyes U.S. DBS market," Broadcasting & Cable, March 20, 1995 at 36.

28 Id.

29 Id.

b. High-Power DBS

According to industry analysts, DBS operators will convince an estimated 1 million cable subscribers to switch to DBS in 1995.[30] High-power DBS services were introduced about a year ago to robust market demand by Hughes Communications Galaxy, Inc./ DIRECTV ("DIRECTV") and United States Satellite Broadcasting ("USSB").[31] Sales of the small, 18-inch home dish reception equipment manufactured by Thomson/RCA for both DBS services were made to 320,000 subscribers by year-end 1994.[32] According to marketing research reports, forty-five percent of the subscribers that obtained DBS service in 1994 came from cable franchise areas with cable to home penetration of at least 25%.[33] DIRECTV expanded its roster of programming to 150 video channels with the launch of its second satellite (DBS-2) in July 1994. Its third Ku-band DBS satellite was successfully launched on June 9, 1995 and will enable DIRECTV to add another 30 channels by the end of August.[34]

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30 "Cable faces renewed satellite competition," Broadcasting & Cable, June 12, 1995 at 29, 30.

31 At ¶ 40(a) of its NOI, the Commission asks to what extent subscribership for DBS services overlaps. HBO does not possess the information necessary to answer that question. DIRECTV operates the authorization center for DIRECTV and USSB, and thus has access to information regarding the subscriber overlap between DIRECTV and USSB. DIRECTV has not, to date, disclosed those figures.

32 "DBS Comes of Age," Electronic Media, April 24, 1995 at 2.

33 "Cable faces renewed satellite competition," Broadcasting & Cable, June 12, 1995 at 30.

34 Satellite News, June 21, 1995 at 22.

HBO can only estimate the future growth rate of DBS services based on industry and media projections. In April 1995 Satellite Business News estimated that DIRECTV/USSB had 583,000 subscribers and a projected growth rate of 100,000 subscribers per month.[35] Industry analysts project DIRECTV will add 1.2 million subscribers in 1995, bringing its total subscriber base to 1.6 million.[36] DIRECTV's/USSB's growth may be enhanced by the fact that, at the end of 1995, three additional equipment manufacturers will begin supplying DBS hardware for use by DIRECTV/USSB subscribers. These new entrants will bring the total to five hardware providers for the DIRECTV/USSB platform.

As mentioned above, PRIMESTAR has plans to enter the DBS arena in 1996. At least one other entity intends to initiate DBS service near-term. DBS permittee EchoStar plans to launch its first satellite, EchoStar 1, in November of 1995, with a second to follow in the summer of 1996.[37] The company expects to begin service with 75 channels approximately 60 days following a successful launch. EchoStar intends to attract customers with programming priced between $9.95 and $19.95 per month, far below the prices of cable companies and its DBS rivals.[38]

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35 "DBS Comes of Age," Electronic Media, April 24, 1995 at 2.

36 Id.

37 Communications Daily, June 13, 1995 at 10.

38 "EchoStar Reveals Pricing Strategy," Satellite News, June 5, 1995.

c. C-Band HSDs

Since the C-Band DTH service began, approximately 4.5 million C-band home satellite dishes ("HSDs") have been shipped and there are approximately 2.3 million subscribers to C-band programming services.[39] Another 400,000 C-band subscribers are expected by the end of the year.[40] In response to the Commission's questions at ¶ 45(c), (d) of the NOI, HBO surmises that C-Band's record growth in 1994 was attributable largely to the attention given to direct-to-home satellite services, primarily DBS. Over $100 million has been spent on advertising and promotion of services such as PRIMESTAR and DIRECTV. The increased awareness of satellite television in general developed by these advertising campaigns likely flowed to the benefit of C-band services.[41]

A variety of distributors have arrangements to package and offer HBO services via C-band. For example, in addition to HBO's own C-band HSD retail distributor, HBO Direct, Inc., there are twenty-one non-cable distributors, plus numerous cable distributors, who package HBO's programming services with other programming and distribute the packages to HSD customers. Each C-band HSD distributor packages programming in its own way, sets its own retail price, and has no difficulty obtaining access to quality programming. In fact, eighty percent of HSD users who

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39 Satellite News, May 22, 1995 at 6.

40 "DBS Comes of Age," Electronic Media, April 24, 1995 at 2.

41 For example, much of HBO's C-band subscriber growth in 1994 came during the "ramp-up" period for DBS, when there were insufficient supplies of DBS equipment to meet available demand.

subscribe to HBO receive HBO programming not through HBO Direct, but through these other non-cable distributors.

As the Commission has recognized, sales of new HSD systems and new subscriptions to HSD program packages have slowed substantially in the last few months.[42] HBO has no explanation for this fall off other than perhaps the competitive entry of DBS.[43] In any event, HBO believes that there will remain a viable core of C-band HSD users for many years to come. HBO is committed to continuation of its C-band HSD services, and has entered into C-band satellite leases enabling it to serve its HSD customers for many years into the future.

3. SMATV

SMATV systems, also known as private cable systems, have showed growth in terms of systems and subscribers. According to the 1994 Competition Report, there were between 3,000 and 4,000 SMATV systems serving about 1 million subscribers in August of 1994. Because of the substantial competition in multiple-dwelling units (MDUs), where they face substantial competition from

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42 In May, General Instrument recorded 19,694 HSD deauthorizations. The average number of deauthorizations for the first five months of 1995 was 13,502, compared to a 1994 average of 10,363. Gross authorizations for May were 29,287 and net authorizations were 9,593, far below monthly net authorization growth during 1994. Satellite Business News, June 21, 1995 at 1.

43 It is possible that manufacturers did not anticipate the demand for DTH services spurred by the interest in DBS, and therefore C-Band equipment shortages in the early part of the year contributed to the slow down in sales.

wireless SMATV, cable operators have low penetration in SMATV properties.[44]

4. Local Exchange Carriers ("LECs")

LECs have continued their vigorous attempts to enter the market for video programming distribution. Over the past year, LECs have demonstrated that they possess the technological expertise and the fiscal strength to distribute video programming to subscribers. As the Commission has reaffirmed and to some extent modified its regulatory treatment of Video Dialtone ("VDT"),[45] impediments to market entry by the LECs have tumbled.

LECs view the delivery of video programming as a substantial part of their growth plans. For example, US West announced on

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44 "MDUs Could be 1st Telephony Target; Multiple-Dwelling Units," Multichannel News, Jan. 9, 1995. The market for hotel pay-per-view services in particular is fiercely competitive, primarily because providers cannot keep up with the costs associated with rapid technology changes. For example, SpectraVision, Inc., a leading supplier of pay-per-view programming for the lodging industry, filed for Chapter 11 bankruptcy on June 8, 1995, after losing one of its major clients, Hilton Hotels. The hotel pay-per-view arena is characterized by distributors losing major hotel chain customers to rivals whose technology leap-frogs their own, providing more movies more often. See "Horror Show," Forbes, June 5, 1995 at 14; "SpectraVision Files Chapter 11 - Second Time," Chicago Sun-Times, June 9, 1995 at 50.

45 See In re Telephone Company-Cable Television Cross-Ownership Rules, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rule Making, CC Docket No. 87-266 (Nov. 7, 1994). Additionally, several federal courts have freed the LECs from cross-ownership constraints based on First Amendment principals. See The Chesapeake and Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), aff'd, 42 F.3d 181 (4th Cir. 1994); US West, Inc. v. United States, 855 F. Supp. 1184, aff'd, 48 F.3d 1092 (9th Cir. 1994); BellSouth Corp. v. United States, No. CV 93-B-2661-S, slip op. (N.D. Ala. Sept. 23, 1994); Ameritech Corp. v. United States, Nos. 93-C-6642 and 94-C-4089 (N.D. Ill. Oct. 27, 1994).

April 10, 1995 that it was issuing a new class of stock for its cable and wireless cable businesses. The company said the current stock price did not reflect US West's expansion into more rapid growth businesses like cable television.[46]

Building a VDT infrastructure is expected to cost between $1,400 to $1,800 per household for hybrid (fiber optical/coaxial cable) connections. Charges for the LEC video service are estimated by some to be competitively priced at around thirty dollars per month.[47]

The first commercial VDT offering, for Dover Township, New Jersey, will provide subscribers a network with 384 channels, each with a capacity of 6 Mbps. Under Bell Atlantic's tariff, Dover Township VDT providers will be able to choose month to month (3 month minimum) or 5 year service periods. The VDT network includes plans for broadcast channels and interactive text.[48]

Perhaps the most notable development regarding LEC entry into the MVPD marketplace over the past year has been the LECs' obvious reluctance to wait until they have installed sophisticated networks of fiber optic cables before they break into the video programming delivery market. As demonstrated above, PacTel bought Cross Country Wireless and expects that its ownership of the MMDS company will enable PacTel to offer video services to 5 million

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46 Mark Lander, "US West to Issue Class of Stock for Cable," N.Y. Times, April 11, 1995, at D2.

47 "Toeing the Line for Video Dialtone; Telecommunications Companies' Initiatives in the Video Dialtone Market; Industry Overview," Communications International, Jan., 1995.

48 Television Digest, Feb. 6, 1995 at 4.

consumers by the end of 1996.[49] Similarly, Bell Atlantic and NYNEX have invested in CAI Wireless, and through various methods, expect to deliver video programming to 7 million households in the Northeast and mid-Atlantic states by the middle of next year.[50] NYNEX has also allied with Liberty Media to use its SMATV system in the New York metropolitan area.[51] Although US West has asked the Commission to suspend consideration of its five VDT applications until the company has time to weigh the results of a trial in Omaha, it continues to invest in a mix of technologies in which some markets might be served by wireless, fiber, broadband or a hybrid.[52]

Three RBOCs, Bell Atlantic, NYNEX and PacTel, have set up a programming company chaired by former CBS President Howard Stringer, further demonstrating their commitment to expand their business into the delivery of multichannel video programming.[53] More recently, the press has reported a possible arrangement among The Walt Disney Co., Ameritech Corp., BellSouth Corp. and SBC Communications, Inc. for using The Disney Channel's affiliate

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49 "MMDS (wireless cable): A capital idea," Broadcasting & Cable, May 1, 1995 at 17.

50 Id.

51 The New York Times, April 18, 1995 at D1.

52 "VDT Suspension Sought," Television Digest, June 5, 1995.

53 "In orbit broadcasting -- radio's growing satellite competition," Satellite Communications, April 1995 at 48.

staff to negotiate programming contracts for the telco consortium.[54]

In addition to the regulatory and technological hurdles which the LECs struggled to overcome during the past year, from a programmer's perspective, there are certain business considerations which make LECs' offerings less attractive. First, after reviewing the cost structure contained in the commercial VDT tariffs filed by the LECs, HBO is concerned as to whether programming can be delivered to consumers under the terms of these tariffs at competitive prices. Second, the LECs have not provided patent indemnification protection for programmers in the event that the technology the LECs deploy becomes the subject of patent infringement claims. Programmers such as HBO invariably have become enmeshed in patent infringement claims involving distribution technologies over which the programmers have no control.[55] Unless the VDT provider who selected the technology

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54 See Multichannel News, May 22, 1995 at 3. Some programmers have voiced their concerns regarding the telco collectives because of the potentially pernicious effects of having to deal with consortiums of such powerful providers and because, in the case of the Disney consortium, it would entail revealing prices and other proprietary information to a competing network, which could use the information to its own advantage and would have an incentive to disadvantage competitive services in their placement among the telco offerings.

55 For example, in April 1995, HBO and numerous other programmers were named as co-defendants in patent infringement suits filed by Feature Film Services, Inc. against General Instrument Corporation. Because HBO has little or no involvement in the design, manufacture and deployment of the various technologies used in the distribution of its programming services, however, it has taken steps to ensure that it will not be financially liable

Continued on following page

provides patent indemnification protection, programmers will be reluctant to use the VDT platform.

5. Cable Overbuilds

Although the number of cable overbuilders remains relatively small, and most MSOs consider it economically irrational, investment in this area of competition to cable providers is significant. For example, in Nassau County, New York, Liberty Cable will overbuild the system of Cablevision Corp. using NYNEX's infrastructure. This overbuild requires NYNEX to spend $150 million to upgrade the network for video transmission. This upgrade represents competing service to 387,500 subscribers in Cablevision's Woodbury system, the largest cable system in the U.S., according to Warren Publishing's Television & Cable Factbook.[56]

6. Over-the-Air Television

Over-the-air television remains the most popular method of video programming distribution in the country. The four major networks account for 42.9% of the prime time audience.[57] The past year witnessed the debut of two new networks, United Paramount and The WB Television Network, but it is too soon to estimate their competitive impact.

Continued from previous page
for intellectual property matters totally beyond its control, and seeks to obtain from technology suppliers contractual indemnification protections should patent infringement claims arise.

56 Communications Daily, July 1, 1994 at 9.

57 Advertising Age, March 27, 1995 at S1.

Two prospective changes in the way broadcasters operate have the potential to affect the competitive stature of broadcast television in the near future. The first is the likely liberalization of television ownership restrictions, creating additional horizontal concentration and increased economies of scale. Second is the possibility that broadcasters will receive 1,691 new 6 MHz dial positions or "second channels" to begin their transition to digital transmissions. The second channel would permit broadcasters to provide HDTV and other services, enable broadcasters to ensure their digital future, and continue to ensure their competitive position against other forms of video distribution. Numerous questions remain to be answered about how broadcasters will be permitted to use this capacity and the treatment of this capacity by cable television.

7. Other Distribution Technologies

Other distribution technologies factor into the competitive equation for the distribution of video programming, most notably video cassette recorders ("VCRs"). VCRs are in eighty-five percent of U.S. households and are used primarily not for "time shifting" but as devices for exhibiting pre-recorded video-cassettes.[58] Home video competes directly with traditional cable offerings, and specifically with premium and pay-per-view services because both offer commercial free movies. The popularity of home video is evidenced, for example, by the phenomenal growth of

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58 The Washington Post, May 31, 1995 at R16. Only 21% of consumers who own VCRs use them for time-shift recording. Electronic Media, March 27, 1995 at 3.